

Francis Lord Bishop of Rochester,
Dean of the Collegiate Church
of St. Peter Westminster,
Michael Evans Clerk, Lawrence
Broderick, Rob. Cannon, and
Harry Barker, Doctors in Di-
vinity, four of the Prebendaries
of the said Collegiate Church,

App^{nts}.

Sir Robert Raymond His Maje-
sty's Attorney-General, Nicho-
las Onley, Thomas Dent,
Thomas Lynford, and Ed-
ward Gee Doctors in Divini-
ty, and Samuel Lord Bishop
of Carlisle, five of the Preben-
daries of the Collegiate Church
aforesaid, Robert Freind Do-
ctor in Divinity, Master of
Westminster School, and Wil-
liam Farrer, Esq.

Resp^{nts}.

The Respondents C A S E.

May 1708.

SIR Edward Hannes K^t. by his Will appointed that his Executors Dr. Waugh and Joseph Shayle, should lay out the Sum of 1000 l. in erecting a Building (commonly called the Dormitory) for the Lodging of forty Queen's Scholars for the time being, in Westminster School; in such Place as should be directed by the Dean and Chapter of Westminster. In contriving and designing of which Building, he desired Sir Christopher Wren and Dr. Aldrich then Dean of Christ's Church in Oxon, should be consulted. On which Building should be inscribed these Words: *In honorem Annæ Reginae optima posuit Edwardus Hannes Miles & Archiater.*

After the said Sir Edward Hannes's Death, a Bill was exhibited in the High Court of Chancery, by Temperance Hannes his only Child an Infant, against the said Executors and others, for an Account of the Testator's Estate. And

July 1711.

On hearing that Cause, it was (*inter alia*) decreed by the Right Honourable the Lord Harcourt then Lord Chancellor, That the said 1000 l. should be laid out by the Executors, in erecting a Building for the Lodging of forty Queen's Scholars in such Place as should be directed by the Dean and Chapter of Westminster: In contriving and designing of which Building, they were to consult Sir Christopher Wren.

About this time, Dr. Sprat late Bishop of Rochester, and Dean of Westminster, had some Thoughts of erecting the said Building in the Garden belonging to the said College, called the Common or Prebendaries-Garden, but soon laid aside that Design, because he found more Difficulties and Inconveniencies in his way, than he at first foresaw, and particularly a great Opposition from the Chapter; for Seven of the Prebendaries, viz. the Respondents, Dr. Onley, Dr. Dent, Dr. Gee, and the Lord Bishop of Carlisle, together with Dr. South, Dr. Barton, and Dr. Sartre, since deceased, by an Instrument under their Hands dated the 23^d of April, 1711, did protest against such Design, and declared, *They neither did or could give their Consent to a thing so prejudicial to their Rights, and detrimental to the Good of the College.* The Respondent Dr. Lynford was of the same Opinion, but being then out of Town, he had not an Opportunity of subscribing with his Brethren.

After this Protest of so many Prebendaries, the said late Bishop, having always a tender Regard to the Peace of the Society, intirely laid aside the Design of Building in the Garden, and to the great Satisfaction of all the College, On

March 1712.

By an Act of Chapter, reciting the Will of Sir Edward Hannes, and setting forth, *That the said Dean and Chapter being desirous as far as in them lay to further the good and pious Design of the said Sir Edward Hannes, It was directed and appointed, that the Place where the forty Queen's Scholars were then lodged, should be the Place for the erecting such a Building as was by him intended.*

In pursuance of this Resolution, Her Majesty's then Attorney-General, for and on the behalf of the Queen's Scholars in the said School, preferred a Petition to the then Lord Chancellor, setting forth (*inter alia*) the said Appointment made by the Dean and Chapter, and that Dr. Aldrich being dead, Sir Christopher Wren had been consulted in contriving and designing the said Building, who had certified his Opinion in Writing, that the 1000 l. left by the said Will, would not be near sufficient to erect a new Building from the Ground for the Purposes in the said Will; but if the Upper Part of the Old Building, where the Queen's Scholars then lodged, were pulled down, and a new Roof with a Ceiling, and new Windows were made, the same would be a decent and convenient Room, and that the same might be performed for the Sum left by Sir Edward Hannes: In contriving which Apartment, he would be ready to give his Assistance when desired.

April 1713.

On hearing the said Petition, and Counsel on both sides, and the said Appointment made by the said Dean and Chapter, and Sir Christopher Wren's Certificate being read, his Lordship ordered, *That the said 1000 l. should be applied in perfecting such Building as aforesaid, according to the Appointment made by the said Dean and Chapter, and the Method proposed by Sir Christopher Wren.*

At the hearing of this Petition, the Appellant Dr. Broderick, and the Respondent Dr. Freind, attended the Court of Chancery, at the Request of the late Dean; and Dr. Freind, being asked by the Lord Chancellor concerning the Situation of the old Dormitory, assured his Lordship, *there was no vacant Place within the Close so convenient for such a Building.*

Immediately after the said Order was obtained, the Scholars were removed out of the Old Dormitory, in order to its being rebuilt: But before this Work was begun, the late Dean died, and not long after, the Appellant the Bishop of Rochester was promoted to the Deanry, and on the 7th of January, 1713, the Dean and Chapter (i. e. the Dean and a lesser Number of Prebendaries making a Majority of a Chapter) upon a Prospect of Contributions, as is now said, made Order for building a New Dormitory in the College Orchard, or Garden, which Order, notwithstanding this Prospect, slept in the Chapter-Book five Years, till it was quite forgotten.

A new Design was thought of for building a Dormitory on the side of the Dean's Yard, where the Brewhouse belonging to the said College stands, and the Respondent Dr. Freind (who had often expressed his dislike of the Garden, as a Situation upon many accounts inconvenient) was desired by the Appellant the Bishop of Rochester to consult with the Surveyor, and to get a Plan of that Ground drawn, which was done accordingly.

Whilst this was under Consideration, a Petition to his Majesty for his Royal Bounty was resolved upon, and it was thought necessary that Six of the Prebendaries should join with the Dean in this Petition. But such

such a Number of Prebendaries (some being then absent) could not be made up without Dr. Onley and Dr. Dent, two of the Respondents, who were known to be averse to any Building in the said Garden, and who joined in the said Petition, upon Assurances then given them, that the new Dormitory should be erected in no other place but what should be to the Satisfaction of them, and all the rest of the Prebendaries.

1718. His Majesty by Warrant under his Sign Manual, upon such Application, was most graciously pleased to give the said Dean and Chapter the Sum of 1000*l.* to be applied towards rebuilding the College wherein are educated the Children, commonly called the King's Scholars, and for repairing the School there. And his Royal Highness the Prince, upon the like Application to him, was pleased out of his Princely Favour to give 500*l.* more for the Purpose aforesaid.

After his Majesty and his Royal Highness had given their Bounty, a Chapter was called, at which the Respondents Dr. Onley and Dr. Dent could not be present. And a new Order (without any notice of the former Chapter Order of 7 January 1713.) was passed by the Dean and Five of the Prebendaries the 29th of December 1718, for building in the Common Garden. But several of the Prebendaries thinking they had reason to complain of this Order as invalid in it self, and injurious to them; some of them in the next Chapter desired that this Matter might be reconsidered in a full Chapter to be summoned for that Purpose, and that every Prebendary might have fair notice of such Chapter. But this Request was not complied with. And the Appellants ordered the Ground in the said Garden to be staked out, and part of the Soil thereof to be dug up, in order to put their design of building there in Execution. Whereupon,

1719. The Respondents exhibited their Information or Bill against the Appellants, and Thomas Spratt, Clerk, since deceased: Setting forth the Rights of the several Respondents which would be encroached upon by the said Building, and (*inter alia*) That the said Garden was appropriated by the Founder for the use of the Prebendaries, together with a Dwelling-house for each of them, and that the said Prebendaries were respectively seized thereof as their Freehold, in Right, and as the Corps of such Prebends. That the Respondent Dr. Freind was seized of a Court Yard or little Garden, leading from the School to the said common Garden as his Freehold for Life, not subject or liable to the Controul or Disposal of the said Dean and Chapter. That the Respondents Dr. Dent in right of his Prebend, and Mr. Farrer, by virtue of a Lease from the said Dean and Chapter, were each entitled to a House adjoining to the said Garden, which, by such Building, intended to be erected there, would be in great measure deprived of their Light, Air, and Prospect, and greatly lessened in their Value. That many Inconveniencies would attend such Building, particularly that it would entirely darken a Lobby of 30 Foot long that leads to the School, very much obscure the Light of the School Library, render the School (which has no Air but from the Common Garden) very close and stifling, and greatly incommode two large Boarding Houses, which are now very airy, and receive about 80 Sons of the Nobility and Gentry. And praying by the said Information an Injunction to stay the Building in the said Garden, and that the said Old Dormitory might be rebuilt upon its present Foundation, according to the aforesaid Order of 20 April 1713. And that the said Royal Bounty of 1000*l.* with the other Charities already given, or to be given, might be duly applied to the same purpose.

The Respondents immediately obtained an Injunction to restrain the Appellants from erecting any Building in the said Garden, or in the Court Yard or Garden belonging to the Respondent Dr. Freind. After which 'tis observable that the Appellants in many respects varied the Plan of the said Building from the first Design, as appears by their own Proofs, to avoid several Objections and Inconveniencies complained of by the said Information. And besides the Alteration of the Plan, the Brewhouse adjoining to the Old Dormitory, (which for about six Years had been disused, and was intended to be entirely laid aside as a Nuisance to the College, and a new Dormitory to be built there) has, since the Information was exhibited, been repaired by Order of the Appellants, at the Expence of about 400*l.* of the College Money, and made an Objection by the Appellants, in their Answer, against the Situation of the Old Dormitory.

The Appellants having put in their Answers to the said Information, the Injunction obtained by the Respondents was, upon hearing Council on both Sides, ordered by his Lordship the now Lord Chancellor, to be continued till the hearing of the Cause.

Issue being joined, and many Witnesses examined. On

20 June The said Cause came to be heard before the Right Honourable the now Lord Chancellor, and after a full Hearing, which lasted two Days, and reading the Charter and Statutes of the said College, and the several Chapter Acts and Proofs in the Cause, and on inspecting the Plans, his Lordship was pleased to order that the Parties should proceed to a Tryal at Law at the Bar of the Court of King's Bench. To try,

1st. Whether the Relators, the Prebendaries of Westminster have such a Right or Interest in the Garden called the Common, or Colledge, or Prebendaries Orchard or Garden in Question, that the Dean and Chapter cannot, without the Consent of the Respondents the Prebendaries, lawfully Build thereon, according to the Plan proposed for building a new Dormitory.

2^{dly}. Whether the Respondent, Dr. Freind, hath such a Right and Interest in the little Garden leading from the School to the said common Garden, that the Dean and Chapter cannot lawfully Build thereon without his Consent, according to the said Plan.

3^{dly}. Whether if the said Building should go on according to the said Plan, it would be such a Nuisance to the Respondents, Dr. Dent and Mr. Farrer, that they might lawfully stop the said Building?

Proper directions were given to facilitate the Tryal, and the Jury to have a view of the several Places in question; and after the Tryal either Party to be at liberty to resort to the Court, whereupon such further Order would be made as should be just.

Which Decree the Respondents humbly insist is right for these Reasons.

First, For that in case the Respondents Proofs had not been so strong, as in fact they were, but they had shewn only a reasonable foundation and probable evidence of a Right, which they have long enjoyed, and claim as their Freehold; yet the Court of Chancery ought not to deprive them thereof by Decree, without giving them an opportunity of having the same tryed and determined by the Courie of the Common Law.

That as to the particular Issues they were properly directed, and upon just Grounds.

1st. As to the first, It appeared by the Statutes of the said Colledge, That the said Garden, called the Prebendaries or Colledge or common Orchard or Garden, was appointed by the Founder of the Colledge for a common Garden: And tho' the whole Site of the Colledge was granted to the Dean and Chapter by Charter, yet that Charter (as all other Colledge Charters are) was restrained by the Statutes, according to a Clause in the Charter, That the Colledge shall be ordered, *Secundum Ordinationes Regulas & statuta iis vel Successoribus suis per nos in quadam Indentura in posterum fienda Specificand. & Declarand.*

That the Prebendaries have accordingly enjoyed this Garden or Orchard ever since the Foundation of the Colledge, and were always thought to have a Right in it, as appears by Acts of Chapter, particularly by one in the Year 1639, wherein 'tis laid, "That none but the Prebendaries living and residing about the Church, shall have a Key to the Orchard. That the Orchard being restored to its former Privacy, the Prebendaries may enjoy the benefit thereof, as of Right they ought to do."

That this Right is conveyed to each Prebendary by his Patent under the Great Seal, which intitles him to the House, and all other Accomodations of his immediate Predecessor: The Words of the Patent are, *Concedimus A. B. Canoniatum five Præbendam modo vacant, &c. Habend. & Tenend. prædict. Canoniat. five Præbend.*

Prebend. prefat. A. B. durante Vita, una cum omnibus & singulis Profit. Commoditat. Domibus, Mansionibus ceterisque Juribus quibus cunque dicto Canonici. five Prebendae quovis modo pertinent. adeo plene, libere, & integre, ac in tam amplis modo & forma, prout C. D. aut aliquis al. predecessor, &c.

This Garden is a great Accommodation to Houses that have no tolerable Outlets or Garden belonging to them, which is the Case of all the old Prebendal Houses: And if the Majority of any Chapter have a Right to take away a Part of this Garden, then whenever any Dean can get three Prebendaries to joyn with him, he may take away the whole Garden; and the House of any Prebendary likewise, since that depends upon the same Reason.

As to the 2d. Issue. The Respondent Dr. Freind has a Grant under the Seal of the Dean and Chapter, in which "They for themselves and Successors, Constitute him Chief Master of the School, To hold the said Office, and all Profits, Lodgings, and all other Accommodations thereunto belonging, in as large and ample Manner as Dr. Knipe, or any other of his Predecessors held or enjoyed the same, for, and during his natural Life.

By virtue of this Grant, Dr. Freind took possession of this little Garden, in the same manner as he took possession of his House or Lodgings, and has enjoyed it ever since. And it is fully proved in the Cause, that this little Garden (called the School Garden) has been possessed and enjoyed by Dr. Busby, Dr. Knipe and Dr. Freind successively, and used by them as their own particular Garden, of Right, exclusive of all others, and that they alone successively had the Key to this Garden, enjoyed the Produce of it, and paid the Gardiner for looking after it.

Objection. The Appellants pretend, that this little Garden belongs to the Dean and Chapter, and that the Respondent Dr. Freind's Enjoyment thereof is only permissive, and that one part of the said Garden is reserved to the Dean and Chapter, by a Clause in the Respondent Mr. Farrer's Lease; and that the other part of the said Garden is not intended to be built upon, but only to have an Arch turned over a small part of it.

Answer. There is no proof in the Cause, that Dr. Freind's Enjoyment of this little Garden is only permissive: On the contrary, it is proved as above, that it is his Freehold, having belong'd to him, and his Predecessors by Grant under the Seal of the Dean and Chapter.

And as to that Part of the Garden, which they pretend, was reserved to the Dean and Chapter, by a Clause in the Respondent Mr. Farrer's Lease. 'Tis true, there is a little piece of Ground reserved in that Lease, and also in a former Lease of the same House to Dr. Forrester: But after this Lease to Dr. Forrester was granted, this piece of Ground was added to the School Garden, by Act of Chapter 12th Dec. 1685, and order'd to be always thereafter annexed and continued to it. Dr. Busby and Dr. Knipe enjoyed this Garden with this Addition; and therefore this piece of Ground is so far from being by that reservation the Right of the Dean and Chapter, that it belongs to the Respondent Dr. Freind, as his Right and Freehold by virtue of his Constitution, as the rest of the Garden does; and therefore he humbly insists the Appellants cannot build thereon, nor can they turn an Arch over the other part of the said Garden, according to their Plan, without his Consent.

As to the third Issue, it is proved, That the intended Building in the common Orchard or Garden will stand within less than five Yards of the Respondent Dr. Dent's Prebendal-House, (at right Angles with it) and consequently obscure his Lights, and intercept his Air.

That the Stair-case thro' which the Scholars are to pass, very frequently every day, is next to the said Respondent's best Rooms at the distance aforesaid, and consequently will be a perpetual Annoyance to him; and during the Building of the new Dormitory, which may be several Years, he will not be able to live in his House.

That the Second Master's Lodgings (part of the intended Building) will stand within ten Yards fronting the Windows of the Respondent Mr. Farrer's best Rooms, and overlooking them; and within five Yards of his side Windows; and will therefore much obscure his Lights, and totally intercept the Prospect and Air of the common Garden, which he now enjoys, and by his Lease (which he holds of the Colledge for forty Years, and for which he paid a considerable Fine) ought still to enjoy.

The Appellants Pretences. The Appellants in their Petition of Appeal pretend, That the Respondents did not make the least Objection to the Building in the common Garden, till the Respondent Dr. Freind thought fit to purchase the Lease of a House granted by the Dean and Chapter to one Mr. Allen; and that the minute Damage, which the said Respondent imagines he may sustain in such Lease, was the first Occasion of this Suit, and that he prevailed with the other Respondents to let their Names be made use of in the said Information.

Answer. Whereas, It is well known that the Respondents, the Prebendaries, have been constantly, and uniformly against any Building in the common Garden, both in the time of the late, and of the present Dean, as is fully expressed in their Protest before mention'd: And that ever since the Year 1711, when this Project was first mentioned, there generally has been, and now is, a greater number of Prebendaries against it, than for it: And the said Respondents were not prevailed upon by Dr. Freind, but did voluntary and heartily enter upon a Defence of their own Rights.

That the Reason of the Respondent Dr. Freind's opposing a Building in the common Garden, did not, as is suggested in the said Petition, proceed from any Interest he has in the said Lease granted to Mr. Allen: But from a full Persuasion that such Building will be attended with many and great Disadvantages to the School and Scholars (whose good he believes himself as much concerned for, and as capable to judge of as any of the Appellants are) and that the Situation of the old Dormitory is much more convenient for that purpose, as he declared in the Court of Chancery the 20th of April 1713, long before he had any thoughts of the said Lease; and it is a Surmise without foundation, that the minute damage, which the Respondent, Dr. Freind, may sustain in the said Lease, was the first occasion of this Suit; the said Respondent not having thought of any Suit, till he was applyed to by some of the Respondents, the Prebendaries, to join with them in defending their several Rights, and opposing a Design so generally prejudicial and inconvenient.

To preserve which Rights, and to prevent several Grievances to themselves and others, The Respondents do most humbly insist on a Tryal at Law according to the Decree, And hope this Honourable House will not deprive them of any benefit which they may have by the Law, of being protected in their just Rights and Properties.

Wherefore for these and many other Reasons, The Respondents humbly hope the said Decree is well founded, and that the Issues thereby directed are necessary, and properly directed, and that the Appeal shall be dismissed with Costs.

P. Yorke.

Spencer Cowper.

Let's Trust Mr. Harewell, had it been unnecessary & improper & if it were had app in so clear a light below as it never have been directed.

* Nottingham. Would it were considered with order to suspend it till a new Chap. m meet to

see if it come to an accomodation. & if any member shall fairly summoned I have no obj busness on week y meet

Dr. Sunders. I ym arison y debate that if any new end I be adm we will not app below or if y regard a new act of Chap if then ever

Cooper. I then debate that any Lawyer but if y just issue was immo, for by Cas of prebend upon in y whole body & or so strict any issue

not every body kn I must own was I unnee & improper & if done as last I labo rev. And as y had y legal estate within, he

Garden to building or a way shall if yud but then eq w consider em only as Trustees for y whole body & if did in an unpropo

rd enjoyn em. & y I was an improper use was only a y in eq w d in Law. as for as it app then to him he that it w be a

garden, then it become little incouned durig the building, y issue a lay Refusance & to stand the y m aller y discie from

to legal at his Prius as far as expenise

Guilford men y Chap & Sunders & Talkland where y debate was adjomed so long y other busness of the house must necessarily have been done

I me more pite I so & Sunders. insist on his motion. The Debate was adjomed for that Day forth

After a rather adjont two or three behavd On May y 16th & the three issues being severally put were reversed wth dious

Continuing thus as to the deed of Chap. which by the Act in the matter of the Dean for building it in
Garden & Co. act it. & to this I have any influence on the present point.
Lord Nottingham & it was now before the house in the case of an Arbitration & to choose some third place.
Cooper & the subject of Chap. was not to introduce new evidence but to satisfy the conscience of the house in a matter suggested by
a majority of the present Chap. were new building it which was not offered before. Which he said was a great practical
well or of L. Ch. as soon as a cause has been hearing & a new matter has been suggested by the other side it has been often returned
examine & in his reports before Ch. has been a decree.
After a long debate about the inconveniences of the old site and one side of the garden by the other side
was put for the Dormitory to be built in the College orchard or not? & Carried in the affirmative

26 = at 24

The Lord Bishop of Ro- } Appell.
chester, and others, }

His Majesty's Attorney- } Respond.
General, and others, }

T H E

Respondents Cafe.

To be heard at the Bar of the House of
Lords, on Tuesday the 28 of March
1721